

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re

PAUL S. HUDSON,

Debtor.

Case No.: 00-11683

Chapter 7

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RICHARD T. CORVETTI,

Plaintiff,

-against-

Adversary Pro. No.: 04-90005

PAUL S. HUDSON,

Defendant.

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APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

### **MEMORANDUM-DECISION & ORDER**

The court denied Paul S. Hudson (“Hudson”) a discharge pursuant to 11 U.S.C. § 727(a)(4).<sup>1</sup> *Washington v. Paul S. Hudson*, Adv. Pro. No. 00-90091, slip. op. (Bankr. N.D.N.Y. Aug. 21, 2001). Hudson timely appealed and then moved for reconsideration of the affirmance of the court’s decision, and the district court, on reconsideration, determined that the matter should be remanded for a further determination.

Richard Corvetti (“Corvetti”) moved for summary judgment in this adversary proceeding requesting that the court affirmatively declare that his actions in opposing Hudson’s appeal of the court’s denial of Hudson’s discharge are permitted under the settlement agreement entered into by the parties during the course of the appeal to the district court (the “Settlement Agreement”), and further asking the court to enjoin Hudson from pursuing litigation in state court seeking to impose liability on Corvetti for those actions. By order dated March 17, 2005, summary judgment was granted in part in favor of Corvetti in that the court found that District Court Judge McAvoy determined in his April 4, 2002 decision that the Settlement Agreement did not settle the § 727 cause of action and that Corvetti was permitted to file papers in opposition to Hudson’s appeal from the decision denying him a discharge. The court further found that Judge McAvoy’s April 4, 2002 decision was not overruled or modified by his November 20, 2002 Corrected Order for Partial Settlement on Appeal. As a result, the court declared that Corvetti is permitted to continue to oppose and file papers with respect to Hudson’s attempts to overturn the denial of Hudson’s discharge, including the remand motion currently pending before the court in Adversary Proceeding No. 00-90091 and any further appeals or proceedings.

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<sup>1</sup>All statutory references herein refer to Title 11 of the United States Code (the “Bankruptcy Code”) unless otherwise specified.

On March 18, 2005, Hudson filed a Notice of Appeal<sup>2</sup> of the court's March 17, 2005 order (Doc. No. 68), and on March 28, 2005, he filed a Designation of Record on Appeal pursuant to Federal Rule of Bankruptcy Procedure 8006. (Doc. No. 80.) Corvetti filed a Limited Objection to Designation of Record on Appeal on April 6, 2005 (the "Limited Objection") (Doc. No. 89), and Hudson filed a Supplementary Designation of Record on April 14, 2005. (Doc. No. 91.)

On or about April 17, 2005, this court transmitted the appeal to the district court. Hudson filed a response to the Limited Objection on April 29, 2005 with the district court. On May 13, 2005, Corvetti filed a reply to Hudson's response with the district court. Hudson designated a revised record on appeal by way of a letter to the district court dated and filed May 20, 2005 (the "Revised Designation of Record on Appeal"). On that same date, Corvetti submitted a letter to the district court in response.

As a result of the parties' inability to agree on the contents of the record on appeal, by order dated May 23, 2005, the district court directed the parties to present their dispute concerning the proper designation of the record on appeal to this court for resolution. (*Hudson v. Corvetti*, 1:05-CV-472, slip. op. (N.D.N.Y. May 23, 2005) (Doc. No. 106.)) This court set a hearing for June 1, 2005. Counsel for Hudson submitted a letter, dated May 31, 2005, setting forth Hudson's position as to what should be designated in the record on appeal. (Doc. No. 109.) Counsel for Corvetti submitted a letter dated June 3, 2005 asking that the court consider the Limited Objection filed with the court, the affidavit and memorandum of law submitted in reply to Hudson's response to the Limited Objection filed with the district court, and Corvetti's attorney's letter to District Court Judge Scullin, which includes a copy of his letter to Hudson's counsel regarding the dispute over the contents of the record on appeal. (Doc. No. 110.) The matter was then taken under advisement.

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<sup>2</sup>The Notice of Appeal was subsequently amended on or about March 28, 2005 to correct the caption. (Doc. No. 79.)

The disputed documents included in the Revised Designation of Record on Appeal consist of the following documents from Hudson's Supplementary Designation of Record:

9. Affidavit by Corvetti in Partial Support of Appellant's Motion, 1/15/02.

10. Letter to Court by Corvetti, 3/13/02.

11. Letter to Court by Corvetti, 4/1/02.

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14. Affidavit by Corvetti in Partial Support of Appellant's Motion, 11/26/01.

...

26. Notice of Motion for Sanctions and/or Contempt by Corvetti against Hudson, 12/30/02.

27. Affidavit by Corvetti in Support of Motion for Sanctions/Contempt, 12/30/02.

28. Memorandum of Law by Corvetti in Support of Motion for Sanctions/Contempt, 12/20/02.

...

36. Notice of Motion by Hudson for Sanctions against Corvetti dated 1/20/02, filed 2/20/03.

37. Affirmation by Hudson in Support of Motion by Hudson for Sanctions against Corvetti dated 1/20/03, filed 2/20/03.

38. Supplemental Affirmation by Hudson for Sanctions against Corvetti, 2/20/03.

39. Memorandum of Law in Support of Motion by Hudson for Sanctions against Corvetti dated 1/20/03, filed 2/20/03.

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43. Supplemental Affirmation by Hudson in support of sanctions motion against Corvetti, 2/17/03.

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46. Affidavit by Hudson in response to Corvetti Cross Motion for Sanctions and in Reply to opposition to Appellant's Sanction Motion, 4/17/03.

(Letter from Netburn to court of 5/31/05, at 2–3, Doc. No. 109.)

The disputed documents are not documents filed with the court in connection with the underlying summary judgment motion or a related adversary proceeding. Rather, these documents are documents originally filed with the district court in connection with the appeal of the order denying Hudson a discharge. The disputed documents, except for document #14, were mentioned in Hudson's Statement of Material Facts (Doc. No. 53) submitted in opposition to Corvetti's motion

for summary judgment.

### **Arguments**

Corvetti argues that the challenged documents should not be included in the record on appeal because they were not included in the record before this court in connection with the motion for summary judgment. Hudson asserts that the disputed documents should be included in the record on appeal because (1) they were presented to this court in Hudson's Statement of Material Facts; (2) each of the challenged documents is directly relevant and highly probative to the issue on appeal; (3) each of the challenged documents was filed with the district court and constitutes a public record; and (4) Corvetti will not suffer any prejudice by the inclusion of the challenged documents in the record on appeal.

### **Discussion**

Generally, once a notice of appeal is filed a bankruptcy court is divested of jurisdiction to proceed with matters directly involved in the appeal, *In re The Barrick Group, Inc.*, 100 B.R. 152, 154 (Bankr. D. Conn. 1989) (citing cases), however, a court may take action in aid of the appeal, including resolving disputes as to the content of the record on appeal. *Id.*; see *In re Ames Dep't Stores, Inc.*, 320 B.R. 518 (Bankr. S.D.N.Y. 2005). As a general rule, "[t]he record on appeal should contain all items considered by the bankruptcy court in reaching a decision.... Conversely, if an item was not considered by the court, it should be stricken from the record on appeal." *In re Ames Dep't Stores, Inc.*, 320 B.R. at 521 (citing *In re The Barrick Group, Inc.*, 100 B.R. at 154). Courts have recognized an exception to the general rule when the interests of justice demand it. *In re Hervey*, 252 B.R. 763, 766 (8<sup>th</sup> Cir. B.A.P. 2000) (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61 (8<sup>th</sup> Cir. 1993) (record on appeal supplemented with material not before lower court to contradict a material misrepresentation made to the lower court by a party)); see *In re Candor Diamond Corp.*, 30 B.R. 17 (Bankr. N.Y. 1983) (documents from adversary proceeding in a related case could be included in record on appeal where material was relevant to bankruptcy court's

exercise of discretion in denying underlying motion to vacate default judgment). The authority to enlarge a record, however, is rarely exercised and is a narrow exception to the general rule. *In re Hervey*, 252 B.R. at 766 (citations omitted).

While the disputed documents were mentioned in Hudson's Statement of Material Facts, they were not filed with the court or put before the court. In rendering its decision granting summary judgment in part to Corvetti, this court did not consider the disputed documents, and thus the court sees no reason to supplement the record that was before it. As a result, the disputed documents are not properly a part of the record on appeal.

### **Conclusion**

Based upon the foregoing, Corvetti's objection to the inclusion of Documents # 9 -11, # 14, # 26 -28, # 36 - 39, # 43 , and # 46 is sustained, and they shall be stricken from the record on appeal.

It is SO ORDERED.

Dated: 7/1/05  
Albany, New York

/s/ Robert E. Littlefield, Jr.  
Honorable Robert E. Littlefield, Jr.  
United States Bankruptcy Judge